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10 UNITED STATES DISTRICT COURT  
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
12 SOUTHERN DIVISION

13 DAVID ANDERSON et al., ) No. SACV 10-31 JVS (MLGx)  
14 Plaintiffs, )  
15 v. ) **NOTICE OF MOTION AND  
16 CHRISTOPHER COX et al., ) MOTION TO DISMISS;  
Defendants. ) MEMORANDUM OF POINTS AND  
17 ) AUTHORITIES  
18 ) Date: July 19, 2010  
19 ) Time: 1:30 p.m.  
Hon. James V. Selna**

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20 PLEASE TAKE NOTICE that Federal Defendants, CHRISTOPHER COX,  
21 MARY L. SCHAPIRO, CYNTHIA A. GLASSMAN, PAUL S. ATKINS, ROEL  
22 C. CAMPOS, ANNETTE L. NAZARETH, TROY A. PAREDES, LUIS A.  
23 AGUILAR, ELISSE B. WALTER, and KATHLEEN L. CASEY (“Defendants”),  
24 by and through their counsel of record, the United States Attorney for the Central  
25 District of California, will bring on for hearing a Motion to Dismiss plaintiffs’  
26 Complaint, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), on  
27 July 19, 2010 at 1:30 p.m. or as soon thereafter as counsel may be heard, in the  
28 courtroom of the Honorable James V. Selna, at 411 West Fourth Street, Santa Ana,

## California.

The motion is made pursuant to Federal Rules of Civil Procedure Rules 12(b)(1) and 12(b)(6) on the following grounds:

- (1) This Court lacks jurisdiction over the claim for declaratory relief.
  - (2) Plaintiffs' complaint fails to state a claim for declaratory relief.
  - (3) Plaintiffs' complaint fails to state a claim for constitutional violations against the Defendants in their individual capacities; and
  - (4) Defendants are protected by qualified immunity.

This motion is based upon this Notice of Motion and Motion to Dismiss, the attached Memorandum of Points and Authorities, all pleadings, papers filed in this action, and any oral argument which may be presented at the hearing of this motion.

## **Statement Re Compliance With Local Rule 7-3**

Defendants complied with Local Rule 7-3 on May 13, 2010.

Dated: May 28, 2010

Respectfully submitted,

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1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2                   **I. INTRODUCTION**

3                   Plaintiffs David Anderson, Nelson L. Reynolds, Sheila Morris, Patrick  
 4 Cluney, Robert Hollenegg, Allan Treffry and Reece Hamilton (Hereinafter referred  
 5 to as "Plaintiffs"), all of whom allegedly owned shares of stock in CMKM  
 6 Diamonds, Inc. (Complaint, ¶¶ 6-12), filed a complaint for declaratory judgment  
 7 and violation of civil rights against Defendants CHRISTOPHER COX, MARY L.  
 8 SCHAPIRO, CYNTHIA A. GLASSMAN, PAUL S. ATKINS, ROEL C.  
 9 CAMPOS, ANNETTE L. NAZARETH, TROY A. PAREDES, LUIS A.  
 10 AGUILAR, ELISSE B. WALTER, and KATHLEEN L. CASEY ( Complaint, ¶  
 11 13). Defendants are current and former Chairmen and/or Commissioners of the  
 12 Securities and Exchange Commission ("Commission" or "SEC") who have served  
 13 since early 2006. The Chairman and Commissioners together constitute the agency  
 14 head who accomplishes the agency's mission in conjunction with the staff in  
 15 Divisions and Offices beneath them. See 15 U.S.C. 78d (Section 4 of the  
 16 Securities Exchange Act of 1934).

17                   **II. FACTUAL BACKGROUND**

18                   Because Defendants are moving to dismiss and must, for purposes of this  
 19 motion, accept the allegations of the Complaint as true, the relevant facts are those  
 20 alleged in the Complaint. The allegations that appear to relate to Defendants and  
 21 the claims against them are as follows.

22                   CMKM was formed in 2004 through a merger of other companies, and  
 23 within a few months of its formation, it had amended its Articles of Incorporation  
 24 to authorize the issuance of 800,000,000,000 common shares with a par value of  
 25 \$0.0001. Complaint ¶¶ 15-16. In 2005, the company was reinstated to a public  
 26 reporting status, but the SEC imposed a temporary suspension of trading of  
 27 CMKM stock based on concerns over the adequacy of publicly available  
 28 information, and then brought an administrative proceeding alleging CMKM had

1 failed to file required reports. Complaint ¶ 18-19. In July 2005, an SEC  
 2 administrative law judge found the facts to be as alleged by the SEC, and in  
 3 October 2005, CMKM started to wind up its affairs by selling its assets.  
 4 Complaint ¶¶ 21-23. Also on October 28, 2005, the SEC entered an order de-  
 5 registering CMKM. Complaint ¶ 23. At that time, CMKM had 703,518,875,000  
 6 shares of common stock issued and outstanding. Complaint ¶ 23. A “Task Force”  
 7 that was involved in liquidating the CMKM assets stated in November 2005 that  
 8 “the number of naked short shares is potentially as high as 2 Trillion shares.”  
 9 Complaint ¶ 24.<sup>1</sup>

10       The Complaint later alleges that from “June 1, 2004 through October 28,  
 11 2005 a total of 2.25 Trillion ‘phantom’ shares of CMKM Diamonds Inc, was sold  
 12 into the public market . . . . The sales of the majority of such shares were at all  
 13 times known to the Securities and Exchange Commission, including Defendants  
 14 herein.” Complaint ¶ 31. The Complaint also alleges that the SEC and the United  
 15 States Department of Justice (with alleged assistance from the Department of  
 16 Homeland Security) used CMKM to “trap[] a number of widely disbursed persons  
 17 who were believed to be engaged in naked short selling of CMKM Diamonds Inc.  
 18 stock” by taking actions related to the management of the company. Complaint ¶  
 19 32. Those actions included facilitating settlement conferences between CMKM  
 20 and persons who had engaged in naked short selling. Complaint ¶ 32(d). In the  
 21 settlement, which was apparently between CMKM and the short sellers, the short  
 22 sellers “promised to pay negotiated amounts to a frozen trust for disbursal at a later  
 23 time” in return for a promise that the United States government would not  
 24 prosecute them. Complaint ¶ 34.

25       Plaintiffs also allege that other moneys were “collected for the benefit of the

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27       <sup>1</sup> The Complaint does not define or explain naked short selling, and  
 28 resolution of this motion does not require definition of that practice. However,  
 some general information on naked short selling is available at  
<http://www.sec.gov/spotlight/keyregshoissues.htm>.

1 shareholders of CMKM Diamonds, Inc. from the Depository Trust & Clearing  
2 Corporation, from the United States Government, and from the sale of additional  
3 assets” (apparently assets of CMKM). Complaint ¶ 35. These assets allegedly  
4 “have also been placed in a trust or are otherwise now held in trust by the  
5 Depository Trust & Clearing Corporation [“DTCC”] and the United States  
6 Treasury.” Complaint ¶ 35. The Complaint does not allege why the DTCC or the  
7 United States government would have put money in a trust for CMKM  
8 shareholders or why the DTCC or Treasury Department would hold assets from  
9 CMKM in trust.<sup>2</sup> It is also not clear whether the Complaint is alleging that these  
10 funds are in the same trust as the alleged funds from naked short sellers.

Without specifying what funds it is discussing, the Complaint continues by alleging that the SEC “reserved unto itself the sole and absolute discretion to determine when moneys collected pursuant to the scheme set forth above would and could be released for distribution.” Complaint ¶ 36. Plaintiffs also allege that “[d]emand for release of said moneys has been repeatedly presented to the Securities and Exchange Commission without result.” Complaint ¶ 37. Allegedly, agents of the SEC and the Department of Justice have said the money would be released soon, but allegedly the governmental agents knew those statements, made “at the specific direction of the named Defendants,” were false. Complaint ¶ 37. The Complaint then concludes that “withholding distribution of said moneys, without compensation and without due process of law, amount[s] to a taking of the property of the individual Plaintiffs.” Complaint ¶ 37.

24       <sup>2</sup> As is evident from public filings, the SEC has brought a civil enforcement  
25 action against CMKM and other related persons alleging that CMKM officers  
26 oversaw a complex scheme to issue and sell unregistered CMKM stock and to  
27 manipulate CMKM's stock price and volume through false statements from  
28 January 2003 through May 2005. SEC v. CMKM Diamonds, Inc., No. 2:08-CV-  
00437 (D. Nev.). The SEC did not bring any claims against alleged naked short  
sellers. While the SEC has obtained judgments requiring substantial payments of  
disgorgement and civil penalties against several defendants, Plaintiffs never  
mention this action in the Complaint or otherwise suggest the funds at issue were  
obtained through the SEC's lawsuit.

1       The Complaint purports to state two causes of action, both against all  
 2 Defendants. First, the Complaint seeks a declaration that Defendants wrongfully  
 3 “cause[d] certain acts and omissions to proceed in such manner” to “prevent the  
 4 distribution of moneys held for the benefit of Plaintiffs,” and that their actions  
 5 caused Plaintiffs “to be deprived of property without just compensation and  
 6 without due process of law.” Complaint ¶ 53. Second, the Complaint alleges that  
 7 Defendants violated Plaintiffs’ “Fifth Amendment right to be secure in their  
 8 property, free from taking without just compensation and without due process of  
 9 law,” and that Defendants’ actions caused Plaintiffs and all persons similarly  
 10 situated to suffer damages “in excess of 3.87 Trillion Dollars.” Complaint ¶¶ 56,  
 11 58.

12 **III. ARGUMENT**

13 **A. Plaintiffs’ Claim for Declaratory Relief Should Be Dismissed Because it**  
 14 **Is Either Barred by Sovereign Immunity or Brought Against the Wrong**  
 15 **Defendants.**

16       Plaintiffs seek declaratory relief from Defendants in both their official and  
 17 individual capacities. Complaint ¶¶ 52-54. Plaintiffs seek a declaratory judgment  
 18 that “declares the validity of the contentions of the parties set forth in Paragraphs  
 19 52 to 54 . . . .” Complaint, Prayer at p. 19. For the reasons stated below, the court  
 20 lacks subject matter jurisdiction to the extent the claim is against Defendants in  
 21 their official capacities and plaintiffs fail to state a claim for declaratory relief to  
 22 the extent the claim is against Defendants in their individual capacities.

23       Claims against the Defendants in their official capacities are barred by  
 24 sovereign immunity. “The doctrine of sovereign immunity applies to federal  
 25 agencies and to federal employees acting within their official capacities.” Hodge  
 26 v. Dalton, 107 F.3d 705, 707 (9<sup>th</sup> Cir. 1997); see also Committee for Immigrant  
 27 Rights of Sonoma County v. County of Sonoma, 644 F.Supp.2d 1177, 1192-93  
 28 (N.D. Cal. 2009). A plaintiff suing the United States bears the burden of showing

1 an unequivocal waiver of sovereign immunity. Cato v. United States, 70 F.3d  
 2 1103, 1107 (9th Cir. 1995) (citation omitted); Gilbert v. DaGrossa, 756 F.2d 1455,  
 3 1458-59 (9<sup>th</sup> Cir. 1985) (holding that a suit against officers and employees of the  
 4 United States in their official capacities is essentially a suit against the United  
 5 States and is barred by sovereign immunity). Plaintiffs have failed to identify a  
 6 waiver that would allow their claim for declaratory relief to proceed. Thus, this  
 7 Court should dismiss that claim because it lacks subject matter jurisdiction over it.

8 To the extent Plaintiffs' claims against Defendants in their individual  
 9 capacities seek a court order compelling official Commission action, they have  
 10 failed to state a claim because they have named the wrong defendants. Defendants  
 11 – in their individual capacities – are not parties from whom a declaratory judgment  
 12 (or any other equitable relief) can be obtained. There is no basis in the law for a  
 13 plaintiff to seek equitable relief from a government official, in his or her individual  
 14 capacity, as redress for alleged government violations of constitutional rights  
 15 because the Defendants cannot take government action in their individual  
 16 capacities. See, e.g., Wolfe v. Strankman, 392 F.3d 358, 360 n.2 (9<sup>th</sup> Cir. 2004)  
 17 (declaratory and injunctive relief only available in official capacity suit; it is not  
 18 available in lawsuit against individual government employees in their personal  
 19 capacities). Thus, this Court also should dismiss plaintiffs' declaratory relief claim  
 20 for failure to state a claim.

21 **B. Plaintiffs' Complaint Should be Dismissed In its Entirety Because**

22 **Plaintiffs Have Failed to State a Plausible Claim.**

23 The entire Complaint (to the extent it is not dismissed for lack of jurisdiction  
 24 or because it names the wrong defendants) should be dismissed because it lacks  
 25 "facial plausibility"; that is, it does not, as required by Ashcroft v. Iqbal, 129 S.Ct.  
 26 1937, 1949, 1952 (2009), contain factual allegations "sufficient to plausibly  
 27 suggest" that Defendants took steps to prevent Plaintiffs from receiving funds in  
 28 which Plaintiffs had a property interest.

1       In Iqbal, the Supreme Court clarified that in all federal court cases, Rule 8  
 2 “demands more than an unadorned, the-defendant-unlawfully-harmed-me  
 3 accusation. A pleading that offers ‘labels and conclusions’ or ‘a formulaic  
 4 recitation of the elements of a cause of action will not do.’ Nor does a complaint  
 5 suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’”  
 6 Iqbal, 129 S. Ct. at 1949 (internal citations omitted). Instead, a “complaint must  
 7 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is  
 8 plausible on its face.’” Id.

9       The allegations that were dismissed in Iqbal for failure to satisfy a  
 10 plausibility standard are analogous to the allegations at issue here. In Iqbal, the  
 11 plaintiff alleged that the defendants, the former Attorney General and the director  
 12 of the Federal Bureau of Investigation ““knew of, condoned, and willfully and  
 13 maliciously agreed to subject [him]’ to harsh conditions of confinement ‘as a  
 14 matter of policy, solely on account of [his] religion, race, and/or national origin and  
 15 for no legitimate penological interest.”” Id. at 1951. The plaintiff further alleged  
 16 that the Attorney General was the ““principal architect’ of this invidious policy,”  
 17 and that the FBI director was ““instrumental’ in adopting and executing it.” Id.  
 18 The Court found that these allegations were nothing more than “a ‘formulaic  
 19 recitation of the elements’ of a constitutional discrimination claim.” Id.  
 20 Consequently, “the allegations are conclusory and not entitled to be assumed true.”  
 21 Id. That is, they do not “contain facts plausibly showing that petitioners  
 22 purposefully adopted a policy of classifying post-September 11 detainees as ‘of  
 23 high interest’ because of their race, religion, or national origin.” Id. at 1952.

24       In this case, Plaintiffs’ allegations similarly do not contain any facts that  
 25 plausibly show that there is a trust fund containing funds from naked short sellers  
 26 and others that was gathered to benefit CMKM shareholders. With respect to the  
 27 key allegation that there was “a settlement with the illegitimate brokers, dealers,  
 28 market makers, hedge funds, and other persons and entities that had engaged in

1 naked short selling,” the complaint does not identify a single party to the settlement  
 2 (it does not even say whether the Commission was a party) or provide anything  
 3 other than the most general terms – persons who engaged in naked short selling  
 4 agreed to pay negotiated amounts in return for a promise of no prosecution.  
 5 Complaint ¶ 34.

6 In addition, Plaintiffs do nothing to identify their purported rights under that  
 7 alleged agreement. They say only that “other moneys have been collected for the  
 8 benefit of the shareholders of CMKM Diamonds, Inc. from the Depository Trust &  
 9 Clearing Corporation, from the United States Government, and from the sale of  
 10 additional assets including consent to enter into joint venture agreements with  
 11 other companies holding mineral claims in Saskatchewan, Canada.” Id. at ¶ 35.  
 12 Plaintiffs do not say why, when, or how the DTCC and the United States collected  
 13 money for the CMKM shareholders or explain why they think the money was  
 14 collected.

15 The Complaint also does not identify how or when Plaintiffs were deprived  
 16 of any funds. To the contrary, the Complaint alleges that “the Securities and  
 17 Exchange Commission reserved unto itself the sole and absolute discretion to  
 18 determine when moneys collection pursuant to the scheme set forth above would  
 19 and could be released for distribution.” Complaint ¶ 36. The Complaint also  
 20 refers to statements that agents of the SEC supposedly made promising to release  
 21 money to CMKM shareholders without providing the most basic facts about those  
 22 statements such as the context in which they were made, who made them, and  
 23 when they were made. Complaint ¶ 37. The Complaint also alleges that the  
 24 Defendants directed their agents to make the statements without providing a single  
 25 fact to support that contention. Complaint ¶ 37.

26 The vague and conclusory facts alleged by Plaintiffs do not allow the Court  
 27 to draw any reasonable inference that points to any liability of Defendants; the  
 28 allegations provide nothing more than “a sheer possibility that a defendant has

1 acted unlawfully" (and they may not provide even that). See Iqbal, 129 S.Ct. at  
 2 1949. Consequently, the Complaint does not satisfy the pleading requirements of  
 3 Rule 8(a)(2) and must be dismissed.

4 **C. Plaintiffs' Bivens Claim Should Be Dismissed Because Plaintiffs Have**  
 5 **Not Alleged that Defendants Were Either Personally Involved in, or**  
 6 **Caused Plaintiffs to Be Subjected to, a Constitutional Deprivation.**

7 Even if Plaintiffs' had satisfied the Rule 8 pleading requirements, their  
 8 second cause of action would have to be dismissed. In that cause of action,  
 9 Plaintiffs seek damages from Defendants on a constitutional tort theory of recovery  
 10 under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403  
 11 U.S. 388 (1971). In a Bivens action, the plaintiff *must allege facts, not simply*  
 12 *conclusions*, that show that the defendant was personally involved in the  
 13 deprivation of his constitutional rights. Barren v. Harrington, 152 F.3d 1193, 1194  
 14 (9th Cir. 1998)(emphasis added). Vague and conclusory allegations of official  
 15 participation in constitutional violations are not entitled to be assumed to be true,  
 16 and thus, not sufficient to withstand a motion to dismiss. See Ashcroft, et al. v.  
 17 Iqbal, 129 S.Ct. 1937, 1951 (2009); Ivey v. Bd. of Regents of the University of  
 18 Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

19 A defendant is not liable under Bivens unless the facts establish that the  
 20 defendant had a "personal involvement" in the alleged constitutional deprivation,  
 21 or that there was a "causal connection" between the defendant and the alleged  
 22 constitutional deprivation. See Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir.  
 23 1978) (claims brought pursuant to 42 U.S.C. § 1983);<sup>3</sup> Pellegrino v. United States,  
 24 73 F.3d 934, 936 (9th Cir. 1996) (Bivens liability is premised on proof of direct

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25  
 26       <sup>3</sup> "Actions under § 1983 and those under Bivens are identical save for the  
     replacement of a state actor under § 1983 by a federal actor under Bivens."  
 27 Rumbles v. Hill, 182 F.3d 1064, 1069 (9th Cir. 1999), *cert. denied*, 528 U.S. 1074  
 28 (2000), *abrogated on other grounds*, Booth v. Churner, 532 U.S. 731 (2001); Butz  
     v. Economou, 438 U.S. 478, 500-02 (1978) (liability of federal officials under  
     Bivens same as liability of state and municipal officials under § 1983).

1 personal responsibility).

2 Moreover, respondeat superior, or supervisory liability, is not applicable in  
 3 an individual capacity suit under Bivens. See Iqbal, 129 S.Ct. at 1949; Terrell v.  
 4 Brewer, 935 F.2d 1015, 1018 (9th Cir. 1991). In Iqbal, the Supreme Court rejected  
 5 the notion that a supervisor's mere "knowledge and acquiescence in their  
 6 subordinates' [conduct]" could demonstrate the supervisor's violation of the  
 7 Constitution. See Iqbal, 129 S.Ct. at 1949. Absent vicarious liability, a  
 8 government employee's liability must stem from his or her own misconduct; thus,  
 9 "purpose rather than knowledge is required to impose Bivens liability" on both  
 10 subordinates and supervisors. Id.; see also Bibeau v. Pacific Northwest Research  
 11 Foundation, 188 F.3d 1105, 1114 (9th Cir. 1999).

12 Notably missing from Plaintiffs' Complaint are any factual allegations  
 13 detailing Defendants' direct involvement in the general matters asserted against the  
 14 SEC. Nowhere do Plaintiffs contend in anything other than the most conclusory  
 15 fashion that these high level SEC Chairman and Commissioners said, wrote,  
 16 directed or instructed any of the conduct alleged, nor do Plaintiffs allege specific  
 17 facts demonstrating that Defendants were aware of, or acquiesced in, the alleged  
 18 conduct.

19 Accordingly, Plaintiffs' Bivens claim must be dismissed as there are no  
 20 factual allegations showing that Defendants were personally involved in any  
 21 alleged constitutional violation.

22 **D. The Complaint Fails to Set Forth Facts Sufficient to Overcome**  
**Defendants' Qualified Immunity.**

24 Even assuming that the Complaint set forth facts sufficient to establish that  
 25 Defendants violated Plaintiffs' constitutional rights, each Defendant is entitled to

26 ///

27 ///

28 ///

1 qualified immunity.<sup>4</sup> Government officials are shielded from civil damage liability  
 2 if their conduct does not violate clearly established constitutional or statutory rights  
 3 of which a reasonable person would have known. See Harlow v. Fitzgerald, 457  
 4 U.S. 800, 818 (1981); Romero v. Kitsap County, 931 F.2d 624, 627 (9th Cir.  
 5 1991). The Supreme Court has repeatedly underscored the importance of resolving  
 6 qualified immunity questions at the earliest possible stage in litigation so that the  
 7 costs and expenses of trial are avoided where the defense is dispositive. Saucier v.  
 8 Katz, 533 U.S. 194, 200 (2001). Indeed, the defense of qualified immunity is an  
 9 entitlement not to stand trial or face the other burdens of litigation. Id. (citing  
 10 Mitchell v. Forsyth, 472 U.S. 511 (1985)).

11 In Saucier, the Court established a two-part inquiry in determining whether  
 12 qualified immunity applies: (1) whether taken in the light most favorable to the  
 13 plaintiff, the facts as alleged show the officer's conduct violated a constitutional  
 14 right; and (2) whether the constitutional right in question was clearly established  
 15 such that it would be clear to a reasonable officer that his conduct was unlawful in  
 16 the situation he/she confronted. Saucier, 533 U.S. at 201; Marquez v. Gutierrez,  
 17 322 F.3d 689, 692 (9th Cir. 2003). The Supreme Court recently held that while the  
 18 sequence of the two-part inquiry set forth above in Saucier is often appropriate, it  
 19 is no longer mandatory; thus, the Court may grant qualified immunity if *either* of  
 20 the two prongs of the Saucier test are not met. See Pearson v. Callahan, 129 S.Ct.  
 21 808, 818 (2009).

22 This case is one in which Defendants can easily establish that the first part of  
 23

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24       <sup>4</sup> Because the qualified immunity determination requires consideration of  
 25 whether the facts alleged state a constitutional violation, raising qualified immunity  
 26 is entirely consistent with a motion to dismiss under Rule 12(b)(6) for failure to  
 27 state a claim on which relief can be based. As the Supreme Court has recently  
 28 stated, “whether a particular complaint sufficiently alleges a clearly established  
 violation of law cannot be decided in isolation from the facts pleaded. In that sense  
 the sufficiency of respondent’s pleadings is both ‘inextricably intertwined with,’ . . .  
 . and ‘directly implicated by,’ . . . the qualified immunity defense.” Iqbal, 129 S.  
 Ct. 1946-47 (citations omitted).

1 the test is not satisfied, so the Saucier order can be followed. The Complaint  
2 alleges that Defendants denied Plaintiffs “their Fifth Amendment right to be secure  
3 in their property, free from taking without just compensation and without due  
4 process of law” by withholding distribution of money. Complaint ¶¶ 38-39. But  
5 Plaintiffs have not shown that Defendants violated a constitutional right because  
6 Plaintiffs have not alleged facts sufficient to show that they have a protected  
7 property interest in that alleged money.

8 In addressing property interests, the Supreme Court has stated:

9 To have a property interest in a benefit, a person clearly must have  
10 more than an abstract need or desire for it. He must have more than a  
11 unilateral expectation of it. He must, instead, have a legitimate claim  
12 of entitlement to it.

13 Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Property rights are not  
14 created by the Constitution, but are defined by independent sources such as state  
15 law, statutes, ordinances, regulations or express and implied contracts. Id.; Lucero  
16 v. Hart, 915 F.2d 1367, 1370 (1990). Further, if a right has not vested, it is not a  
17 cognizable property interest. Peterson v. United States Dep’t of Interior, 899 F.2d  
18 799, 807 (9<sup>th</sup> Cir.), cert. denied, 498 U.S. 1003 (1990).

19 Peterson is instructive because it shows that a claim based on an expectation  
20 – even an eminently reasonable expectation – that a person will obtain funds from  
21 the government is not a property interest. In Peterson, several California public  
22 water agencies asked the federal court to declare unconstitutional a provision in the  
23 Reclamation Reform Act of 1982, which they claimed interfered with their rights  
24 to receive subsidized water from federal reclamation projects for certain lands.  
25 Plaintiffs made two arguments to establish a constitutionally-protected property  
26 right. First, they argued that such a right was implicit in contracts they had with  
27 the federal government. Second, they contended that they had a “reasonable  
28 investment-backed expectation to receive water at subsidized rates” even if the

1 right was not included within the contract. Peterson, 899 F.2d at 812. The  
 2 Ninth Circuit found that the contract between the plaintiffs and the federal  
 3 government was insufficient to establish a property right, so it turned to the second  
 4 argument. Id. at 811. The court rejected the plaintiffs' second argument, noting  
 5 that the plaintiffs did not have a property interest just because they expected to  
 6 receive certain funds from the government and made investments based on that  
 7 expectation. Id. at 813.

8 Moreover, numerous cases illustrate the proposition that an individual has no  
 9 property interest in a particular benefit where a government agency retains  
 10 discretion to grant or deny the benefit. See, e.g., Erickson v. United States, 67 F.3d  
 11 858, 862 (9<sup>th</sup> Cir. 1995) (under due process clause, doctors had no property interest  
 12 in continued participation in Medicare or Medicaid); Greenwood v. FAA, 28 F.3d  
 13 971, 976 (9<sup>th</sup> Cir. 1994) (where annual renewal of pilot examiner designation was  
 14 left to the discretion of the FAA, plaintiff had no entitlement); Swanson v. Babbit,  
 15 3 F.3d 1348, 1353-54 (9<sup>th</sup> Cir. 1993) (undertakings clause, no vested right to obtain  
 16 patent to mining claim upon filing of claim where agency had discretion to review  
 17 claim).

18 Here, Plaintiffs fail to establish a constitutionally-protected property interest  
 19 and thus their Fifth Amendment claim (under either the Due Process Clause or the  
 20 Takings Clause) is not cognizable. Plaintiffs attempt to base their property interest  
 21 on a purported promise from unidentified entities engaged in naked short selling  
 22 who allegedly "promised to pay negotiated amounts to a frozen trust for disbursal  
 23 at a later time" in exchange for "a U.S. Government promise of no prosecution" for  
 24 naked short selling. Complaint ¶ 34. This allegation illustrates that Plaintiffs  
 25 themselves have not entered into a contract and have not obtained any enforceable  
 26 rights. Indeed, Plaintiffs allege that the Commission has "the sole and absolute  
 27 discretion" to determine when to disburse the purported pool of money. Complaint  
 28 ¶ 36. As discussed above, individuals have no vested property interest in a

1 particular benefit where a government agency retains discretion to grant or deny  
2 the benefit.

3 Because Plaintiffs have not alleged that they have a vested property interest  
4 in the alleged trust fund at issue, they have not made allegations sufficient to show  
5 that Plaintiffs violated a constitutional right.

6 **IV. CONCLUSION**

7 For the reasons set forth above, Plaintiffs' action must be dismissed in its  
8 entirety.

9  
10 Dated: May 28, 2010

11 Respectfully submitted,

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